it has not suffered any loss. Of course, if the business can only be carried on at a loss – it should not be carried on at all.

Those, I think, are really the reasons why, in practice, a stay is not granted – a profitable business can be carried on as it was before and handed back as a going concern if the appeal is allowed. If it is not allowed then, of course, cadit quaestio."

As here, the Act gives jurisdiction to grant a stay (section 243), but as a matter of practice a stay is never granted. The reasons for the practice are expressed in the cogent judgment of Plowman J. from the passage which I have just read. I endorse those views and refuse to grant a stay.

Order accordingly.

Solicitors: *Skrine & Co.; Baharuddin, Bernatt, Tan & Ker.*

A. PERIANAYAGAM & ANOR. v. YEO SUAN TIN & ANOR.

[O.C.J. (Siti Norma Yaakob J.) February 17, 1984]
[Kuala Lumpur – Civil Suit No. 1771 of 1975]

Road Traffic – Fatal accident – Liability – Car went out of control when tyre burst – Defendants absolved from any blame whatsoever.

The fatal accident in this case involved three vehicles, a motor cycle ridden by the deceased with his brother-in-law as pillion, a car driven by the first defendant and another car driven by the second defendant. All three vehicles were proceeding from the direction of Klang towards Kuala Lumpur. At that particular stretch, the Highway has three lanes on one side with a central divider that separates traffic coming from the opposite direction. There is also a side road to the left and immediately opposite this there is a break in the divider to allow cars from Klang to either make a U-turn at the break and proceed back towards Klang or cross the other side of the Highway towards another side road immediately facing the divider. The deceased was heading for this side road and had intended to turn right at the break in the divider, cross the other side of the Highway and proceed into the side lane. He did not however make it to the side road as his motor cycle was collided into by the first defendant and after he had fallen onto the road, the 2nd defendant ran over him.

Held: from the evidence and in all probability, the accident could only have happened because the deceased shot out from the side road right into the path of the defendants and for this foolhardiness, the defendants should be absolved from any blame whatsoever.

[**Editorial Note:** The plaintiffs have appealed against the above Judgment to the Federal Court in Federal Court Civil Appeal No. 8 of 1984 and dated April 4, 1984. The appeal is pending.]

CIVIL SUIT.

C.H. Koh (*C.C. Choo* with him) for the plaintiffs.

Miss Rasamani Kandiah for the first defendant.

Miss Anusha Santhirasthipam for the second defendant.

Cur. Adv. Vult.

Siti Norma Yaakob J.: The fatal accident leading to this cause of action happened at the 12th mile, Federal Highway on October 15, 1972 at about 5.45 p.m. It involved three vehicles, a motor cycle ridden by the deceased with his brother-in-law as pillion, a car driven by the first defendant and another car driven by the second defendant. All three vehicles were proceeding from the direction of Klang towards Kuala Lumpur. At that particular stretch, the Highway has three lanes on one side with a central divider that separates traffic coming from the opposite direction. There is also a side road to the left which is marked as 'P' in the sketch plan, AB.4, and immediately opposite 'P' there is a break in the divider to allow drivers coming from Klang to either make a U-turn at the break and proceed back towards Klang or cross the other side of the Highway towards another side road immediately facing the divider. The deceased was heading for this side road and had intended to turn right at the break in the divider, cross the other side of the Highway and proceed into the side lane. He did not however make it to the side road as his motor cycle was collided into by the first defendant and after he had fallen onto the road, the 2nd defendant ran over him.

According to the deceased's brother-in-law, P.W.2, they had left the deceased's home in Klang on the deceased's motor cycle. Before approaching the break in the divider, they had crossed from the left lane to the lane nearest the divider and at that point of time, P.W.2 had turned back and saw the 1st defendant's car approaching 300 feet behind. They reached the lane near the divider safely, proceeded for another 100 feet and just when they were about to turn right into the break in the divider, the first defendant's car knocked into the rear of the motor cycle, throwing both the machine and its passengers to the road. P.W.2 managed to crawl to the divider and the next thing he saw was the deceased standing up on the road and the 2nd defendant's car running right into him.

The first defendant's version of the accident was that he was proceeding along the centre lane and just as he neared the junction, he saw the deceased shot out from the side lane to his left and although he swerved right in an effort to avoid hitting the motor cycle, he was not successful and the motor cycle hit the left door of his car. The impact caused the car to be pushed against the side of the central divider. The first defendant lost control of his car when one of the tyres was punctured as a result and he only managed to stop his car 174 feet away on the flat area of the divider. Upon getting down from the car, he saw the deceased lying on the road not very far away from the bus stop which is marked as 'D' in AB. 4

Like the first defendant, the second defendant was also travelling in the same direction directly behind the first defendant. He too saw the deceased shot out from the side lane at 'P', cut across the path of the first defendant resulting in the collison with the first defendant's car. Seeing this, the second defendant took evasive action by swerving to his right but in doing so, he knocked into an object which he could not identify at the trial, causing his car to bounce into the divider and it only came to rest 120 feet behind the first defendant's car by the side of the divider.

From the contradictory evidence adduced, the first issue to be established is from which direction was the deceased proceeding just before the collision with the first defendant's car. Was he proceeding on the lane nearest the divider as P.W.2 wanted me to believe or did he shoot out from the side road at 'P' into the path of both the defendants as they have so maintained? To consider this, I relied more on the silent evidence adduced in the sketch plan 'AB-4' and the three police reports made by the defendants and P.W.2 individually. The first information report came from the second defendant. He reported the matter to the police at the Police Station across the road where the accident happened, within 10 minutes of the accident. In his report at AB.1, he mentioned that he was following the first defendant and he saw the motor cycle shot out from across the side road and collided into the first defendant's car and his own car ran into one of the two passengers who had fallen from the motor cycle. The first defendant also made a report the same day at 6.40 p.m. and his report, AB.2, also mentioned that the deceased shot out from across the side road right into his path and in spite of his attempt to avoid the collision, the motor cycle hit the front portion of his car all the same. From his own silent admission in his police report at AB.12, P.W.2 was hospitalised for one week but it was only on November 4, 1972 that he lodged his report, i.e. two weeks after he was discharged from hospital and more than three weeks after the accident. No reason was given for this delay but in cases of this nature, such delay has the effect of making victim like P.W.2 wiser after the event and he is liable to manufacture facts to hide the true state of affairs. From his demeanour in the witness box, I did not quite believe him when he stated that when the deceased crossed from the extreme left lane to the extreme right lane, he had seen the first defendant approaching at the distance of "15 times the length of this Court room", which I estimate to be around 300 feet. Yet at that very safe distance, an accident did happen and this can only mean that the deceased was very much nearer to the first defendant.

The sketch plan, AB.4 shows the motor cycle lying in the middle lane at 'F' just at the centre of the cut-off break in the divider. As there was no evidence that the motor cycle was dragged after the collision with the first defendant's car, I can only deduce that it fell on to the road at the point of impact which must be at 'F'. This lends credence to the evidence of the first and second defendants that the first impact must have happened somewhere in the middle lane and nowhere in the lane nearest the divider. Despite the reluctance of the second defendant to admit that his car had run into the deceased after the first impact, I have no doubt whatsoever that this actually happened as he had so frankly admitted in his police report in AB.1 and moreover, the extensive injuries on the deceased appearing in his post-mortem report, AB.4, appear to be quite consistent with him being run over by a car. I attribute the second defendant's reluctance to make an open admission as nothing more than the fear and anguish that he might be held liable for his death which, under the circumstances, he cannot be held so liable. Moreover, the position of the deceased's body at '0' lends more support to the fact after he fell off his motor cycle at the first impact, he was knocked into by the second defendant and his body was thrown to '0'.

A number of possibilities were given to the rather long brake marks made by the first defendant's car, especially to the deduction that he must have been speeding. From the evidence, I can only conclude that this was caused when the car went out of control after its front right tyre burst after the first impact. The length of the tyre mark also

lends support to the defendants' testimony that the ground was wet and slippery at that time making it difficult for a car that is out of control and with a punctured tyre to come to a complete stop.

From the evidence and in all probability, this accident could only have happened because the deceased shot out from the side road right into the path of the defendants and for this foolhardiness, the defendants are absolved from any blame whatsoever. I had accordingly dismissed the action with costs.

Claim dismissed.

Solicitors: *Mah-Kok & Din; Khoo & Sidhu; Shearn & Delamore.*

BALFOUR WILLIAMSON (S) PTE. LTD. v. GOLDEN LADY (M) SDN. BHD.

[O.C.J. (Yusoff Mohamed J.) February 26, 1984]
[Johore Bahru – Civil Suit No. 267 of 1980]

Bills of Exchange – Bills of exchange accepted and indorsed by defendants – Whether bills were accommodation bills – Principle "acceptor primarily liable on the bill" applied.

An acceptor is primarily liable on the bill.

CIVIL SUIT.

Abdul Raman Hj. Saad for the plaintiffs.
Chin Yew Meng for the defendants.

Yusoff Mohamed J.: In this appeal against the Senior Assistant Registrar's decision disallowing interlocutory judgment to the plaintiffs, the arguments were short and straightforward in that whether the 17 bills of exchange drawn by the plaintiffs to the total value of S$872,166.03 and accepted by the defendants were accommodation bills under section 28 of the Bills of Exchange Act 1949 (Act 204).

In their Statement of defence as well as in their affidavit in reply dated May 30, 1981, deposed by Lee Lip Chong, Manager of the defendants' company, the defendants do not specifically deny that all the bills referred to were accepted and indorsed by them, Golden Lady (M) Sdn. Bhd., but the denial is in respect of liability to all except for one Bill dated June 16, 1978 to the value of $24,177.00. All the bills, nevertheless bear their company's embossment and signatures of their directors. The reason advanced by the defendants is that these bills were drawn as a result of a devious arrangement by the plaintiffs in order to accommodate further financial facilities which had been accorded to its Singapore sister company known as Golden (Pte.) Ltd. by utilising the defendants' own confirming facilities with the plaintiffs. The deponent Lee Lip Chong was also the Managing Director of the Singapore company. Both the sister companies enjoy similar financial arrangements with the plaintiffs.

The only evidence advanced by the defendants to support this contention is a letter by Rodyk & Davidson, a firm of Solicitors, dated January 14, 1980 in its correspondence regarding the sister company in Singapore – Exhibit LLC-1 and deponent's own letter dated August 16, 1979 – Exhibit LLC-4. Although the letter LLC-1 does not dispute the Singapore company's debt of $800,000/- to the plaintiffs, it is nowhere stated that the debt was incurred arising from the alleged devious arrangement, nor is it stated in its account at Exhibits LLC-2 and 3 as such. In all probability, the debt was the Singapore company's earlier debt incurred from its own $1,000,000.00 confirming facilities with the plaintiffs.

I see no merit in this allegation of devious arrangement on the part of the plaintiffs as raised by the defendants and in my view it is a sham defence designed to delay proceedings. Without this defence the defendants cannot hold themselves as an accommodation party as defined in section 28(1) of Bills of Exchange Act, 1949.

In principle an acceptor is primarily liable on the bill. *Halsbury's* Laws of England, 4th Edition at paragraph 357 states:–

"Whenever a bill is accepted the acceptor is and remains the party primarily liable on the bill whatever may happen to the other parties, and whether any of the other parties are discharged or not. Should an indorser have to pay the bill, the acceptor by the fact of his acceptance is liable to indemnify him".

Upon these grounds the appeal is dismissed. Costs to the plaintiffs.

Appeal dismissed.

Solicitors: *Abdul Raman Saad & Associates, Allen & Gledhill.*